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IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. 255

MISSOURI PACIFIC RAILROAD COMPANY,
PETITIONER

vs.

J. W. COOK,
RESPONDENT

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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The Missouri Pacific Railroad Company prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in this cause.

OPINIONS BELOW

The original opinion of the district court (App. infra, p. 27) is reported at 150 Fed. Supp. 650. The final opinion of the district court (App. infra, p. 36) is reported at 161 Fed. Supp. 538. The opinion of the Court of Appeals (App. infra, p. 39) is reported at 263 F. 2d 954.

JURISDICTION

The original judgment and opinion of the Court of Appeals was entered on February 27, 1959 (R. 12, 21). Time for filing the petition for rehearing was extended

until March 25, 1959 (R. 22) but original petition for rehearing and argument in support thereof was filed on March 20, 1959 (R. 23) and order denying rehearing was entered on April 3, 1959 (R. 41). On July 1, 1959 Justice Black extended the time for filing this petition to August 1, 1959. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

The petitioner, Missouri Pacific Railroad Company, being a carrier within the meaning of the Railway Labor Act, Title 45, U.S.C. Sec. 153, having exercised its right under said Act to refer a minor dispute, namely, its right to discharge an employee for failure to protect his assignment of work, by petition "to the appropriate division of the Adjustment Board" and the Adjustment Board having made its award in which it held "Carrier's action in dismissing J. W. Cook is sustained," the question presented by this petition is whether or not the Railway Labor Act means what it says in referring to minor disputes wherein the language used is: "The disputes between an employee * * * and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions * * * shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner the disputes *may be referred by petition of the parties or by either party** to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon these disputes."

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*Emphasis here and throughout this brief is supplied.

A second question that is likewise involved is whether or not the Railway Labor Act means what it says when, in Title 45, Sec. 153, (m) the following language is used:

> "The awards of the several divisions of the Adjustment Board shall be stated in writing * * * and the awards shall be final and binding upon both parties to the dispute except insofar as they shall contain a money award."

This minor dispute having been submitted to the Adjustment Board, and the Adjustment Board having sustained the carrier's position, and the award not containing any money award, the question is, does the Railway Labor Act mean what it says, i.e., is such award "final and binding upon both parties to the dispute"?

STATUTE INVOLVED

The only statute involved in this case is the Railway Labor Act, Title 45 U.S.C. Sec. 153, and the only paragraphs of such Act involved in this case are paragraph (i) and paragraph (m) which are as follows:

> "(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on July 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes, but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the fact and all supporting data bearing upon the disputes."

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute."

STATEMENT

This action originated in the district court of Bexar County, Texas, in the form of a suit by respondent Cook against petitioner's predecessor in title for a claimed wrongful discharge, the respondent suing for some $25,000 damages (R. 2). The case was removed to the federal court on the grounds of diversity of citizenship, Cook being a resident of Texas, and Guy A. Thompson, Trustee, San Antonio, Uvalde and Gulf Railroad Company, predecessor of the Missouri Pacific Railroad Company and petitioner both being residents of Missouri (R. 3).

The facts are so succinctly stated by the trial judge in his opinion, that the following statement of the facts from the trial court's opinion, is submitted as being a correct statement:

> "In January of 1953, the plaintiff Cook was discharged by the defendant carrier for having failed to protect his assignment for three months without a leave of absence. No action was taken by Cook until December of 1954, at which time Cook filed this suit in the state court and in due time it was removed to this court. Originally Cook prayed for reinstatement and payment for time lost, but the carrier promptly filed its plea to the primary jurisdiction of the court citing in its plea the case of

Slocum v. Delaware, L. & W R. Co., 339 U.S. 239, 70 S.Ct. 577, 94 L.Ed. 795. Thereafter, in May of 1955, at the first hearing in this case, the court indicated that it was felt that under the Slocum case the court had no jurisdiction to order reinstatement and payment for time lost, and the plaintiff thereupon asked, and was granted, leave to amend to eliminate from his pleadings the matter of reinstatement and payment for time lost, which he did.

"The carrier likewise filed a plea based upon the plaintiff's failure to exhaust administrative remedies, and, at the time the case was next called in October of 1955, it was brought to the attention of the court that the case of Thompson v. Moore, 5 Cir., 223 F.2d 91, was pending on application for writ of certiorari to the Supreme Court, and that this case would have a bearing upon the defendant's plea of failure of the plaintiff to exhaust administrative remedies. The case was passed at that time to await the outcome of the Thompson-Moore case. On October 24, 1955, the Supreme Court denied certiorari in the Thompson-Moore case, and thereafter in December of 1955 the carrier filed its submission of this controversy with the proper division of the National Railroad Adjustment Board.

"Thereafter, plaintiff filed its submission with the Adjustment Board, in which it urged laches on the part of the carrier and want of jurisdiction on the part of the Adjustment Board, claiming that exclusive jurisdiction of this controversy was vested in this court.

"Thereupon, the defendant carrier filed in this court its motion for this court to exercise 'equitable discretion to give (the National Railroad Adjustment Board) the first opportunity to pass on the issue', namely, the construction of the Railway Labor contracts, rules, customs and usages involved in this suit. Both parties submitted briefs to this court on the question.

"It is obvious from the plaintiff's complaint that there is involved in this suit a construction of the collective bargaining agreement between the Railroad and the Union, as well as a construction of the operating rules of the Company and the customs and usages of the Railroad, all of which will have to be construed before a decision in this case can be made.

"Under the facts above related, the court is of the opinion that the carrier has acted with comparative diligence in this matter and feels that Cook's plea of laches should therefore be overruled, so that the only question remaining is whether or not this court has compulsory and exclusive jurisdiction of this controversy."

This court, after discussing the authorities and the statute entered its order in the language of the *Pitney* case, exercising "its equitable discretion to give that Board (the National Railroad Adjustment Board) the first opportunity to pass upon the proper construction of the labor contracts, rules, customs and usages that are involved in this suit."

Thereafter, on January 17, 1957, the National Railroad Adjustment Board, First Division, entered its unanimous order or award on the merits of the case and held: "Carrier's action in dismissing J. W. Cook is sustained"; and thereafter, on January 2, 1958, the District Court, pursuant to Title 45 U.S.C., Sec. 153, First (m) dismissed this suit with prejudice (R. 4). An appeal was duly perfected and the Court of Appeals for the Fifth Circuit reversed the judgment of the trial court.

REASONS FOR GRANTING THE WRIT

The Court of Appeals, after holding that Respondent Cook was "an employee * * * subject to the Railway Labor Act" in this minor dispute, in effect judicially repealed that

portion of the Railway Labor Act providing that such disputes may be referred by petition of the parties or by *either party* to the appropriate division of the Adjustment Board.

The Court of Appeals likewise judicially repealed that portion of the Railway Labor Act which provides that except in cases of money awards the decision of the Railroad Adjustment Board "shall be final and binding upon both parties to the dispute."

The Court of Appeals further erred in giving lip service only to the decision of the court in the case of *State of California vs. Taylor*, 353 U.S. 553, wherein this court said:

> "Either party to such a (minor) dispute could bring the other before the Board in what was in fact a compulsory arbitration."

ARGUMENT

Originally there were three questions involved in this case: first, whether or not the Railroad Adjustment Board has jurisdiction in case of a minor dispute between the carrier and an employee no longer in the service of the carrier, the minor dispute, however, involving the interpretation of the collective bargaining agreement, and rules, customs and usages of railroad service; second, there having been an award in this case by the Railroad Adjustment Board sustaining the carrier's position in discharging Cook, the question was presented as to whether or not the Railway Labor Act means what it says when it uses the language that the awards of the Adjustment Board *"shall be final and binding upon both parties to the dispute"*; and third, whether the Railway Labor Act means what it says when

it provides that *either party* to a minor dispute may refer such dispute to the Adjustment Board.

The first of these questions was inferentially decided in favor of the petitioner in this instance by the Court of Appeals wherein the Court of Appeals in the opening sentence of its opinion stated that Cook, who had previously been discharged by the railroad, was "subject to the Railway Labor Act."

This court has likewise upheld the carrier's position in its No. 397 *Pennsylvania Railroad Co., Petitioner vs. Day*, decided on June 29, 1959, in which this court held that a retired employee no longer in the service of the carrier was still subject to the jurisdiction of the Adjustment Board.

The second of these questions, namely, as to whether or not an award of the Adjustment Board is final and binding, was decided by the Court of Appeals adversely to the petitioner herein where in the last paragraph of that court's opinion it said:

> "The award of the Adjustment Board was not binding or final on Cook."

The plain language of the statute says as to the Adjustment Board that its "awards shall be final and binding upon both parties to the dispute", but the Court of Appeals held that this language did not mean what it said and that the award in this case in favor of the railroad "was not binding or final on Cook."

However, it is believed that this court, in No. 414, *Union Pacific Railroad Co. vs. Price*, decided at the same time as *Day* has now authoritatively, for the first time, held that an award of the Adjustment Board upholding the carrier's discharge of an employee, is final and binding and

that the employee is not entitled to a review ... ch an award in court.

The third question, namely, whether "either party" to this minor dispute could present it to the Adjustment Board, was decided adversely to petitioner by the Court of Appeals, despite the many expressions of this court similar to this court's statement in the case of *State of California v. Taylor*, 353 U.S. 553, this court there saying:

> "'Either party to [a minor] dispute could bring the other before the Board in what was, in fact, compulsory arbitration."

This court, in *Day*, and particularly in *Price*, again retraced the history of the 1934 Railway Labor Act, so it would be a needless repetition for petitioner extensively to go into this history, as has been gone into by this court in the following cases: *Elgin, Joliet, and Eastern Ry. Co. vs. Burley*, 325 U.S. 711; *Order of Railway Conductors vs. Pitney*, 326 U.S. 561; *Brotherhood of R.R. Trainmen vs. Chicago R. & I.R. Co.*, 353 U.S. 30; *State of California vs. Taylor*, 353 U.S. 553; and *Union Pacific R.R. vs. Price*, No. 414, decided June 29, 1959.

However, attention is called to that portion of the history given in *Price*, wherein this court said:

> "The employees were willing to give up their *remedies outside of the statute* provided that a workable and binding statutory scheme was established to settle grievances. Mr. George Harrison, president of the Brotherhood of Railway Clerks, stated:
>
> "Grievances come about because the men file them themselves. *Railroads do not institute grievances. Grievances are instituted against railroad officers'*

> *actions*, and we are willing to take our chances with this national board because we believe out of our experience that the national board is the best and most efficient method of getting a determination of these controversies * * * We are now ready to concede that we can risk having our grievances go to a board and get them determined."

The only "remedies outside of the statute" which Labor was willing to give up were the right to strike and the right to litigate in court.

Bearing in mind that "railroads do not institute grievances," Congress, in enacting the Railway Labor Act of 1934, said in unequivocal terms that as to minor disputes between carrier and labor, "the disputes may be referred by petition of the parties or by *either party* to the appropriate division of the Adjustment Board." Therefore, even though it is labor and not the railroad which institutes the grievance and even though the grievance is decided on the property in favor of the railroad — still, since the railroad is one of the "either" parties to the dispute, the railroad was given the right by Congress to refer the grievance to the Adjustment Board, as was done here. This right was nullified by the Court of Appeals in this case.

In this connection, attention is called to this court's per curiam decision in *Manion vs. Kansas City Terminal Ry. Co.*, 353 U.S. 927. In *Manion*, the lower court, 297 S.W.2d 31, had affirmed the issuance of an injunction against the railroad labor union preventing a strike over minor grievances which had not been presented by either party to the Adjustment Board. This court said in its per curiam opinion:

> "The petition for writ of certiorari is granted. The judgment of the Kansas City Court of Appeals of Missouri must be vacated in the light of our decision

> in Brotherhood of Railroad Trainmen v. Chicago River and Indiana R. Co., 353 U.S. 30, 77 S.Ct. 635, because the dispute here is not pending before the National Railroad Adjustment Board. The cause is remanded for further proceedings not inconsistent with this decision and without prejudice to the power of the Court of Appeals to reinstate its judgment *if the dispute is submitted to the Adjustment Board by either party within a reasonable time.* Judgment vacated and cause remanded."

Does not this action indicate that as to all minor grievances the Railroad Adjustment Board's jusdiction can be invoked by either party and if such is done, then that is the exclusive remedy and Labor no longer has the right either to strike or to litigate? Is there any logical distinction between the right of Labor to strike over a minor grievance, even though it be the discharge of a single employee, which was one of the minor grievances involved in *Chicago River*, and the right of Labor to sue in court over a minor grievance, even though it be the discharge of a single employee? We submit not.

Attention is called to the fact that there is not involved in this case any question as to whether or not the railroad's submission of this minor dispute to the Adjustment Board was in all things timely. As can be seen from the District Court's opinion, Cook raised the question of laches in the trial court, but the trial court overruled such plea with the statement "that the carrier has acted with comparative diligence in this matter", and the respondent did not complain of this ruling on appeal, so the question of the timeliness of the railroad's availing itself of its privilege of submitting this minor dispute to the Adjustment Board is not before this court.

One of the reasons assigned by the Court of Appeals for reversing the trial court was that in a minor grievance case where there was a conflict between the jurisdiction of the courts and the jurisdiction of the Adjustment Board, there would be "a conscious race against time for the first decision." The trial court, however, in its opinion, pointed out that such was not the case because under the decision of this court in *ORC vs. Southern Ry. Co.* 339 U.S. 255, such question was settled. In *Southern Ry.* it was the railroad who had first invoked the jurisdiction of the courts over a minor dispute and thereafter it was Labor who invoked the jurisdiction of the Adjustment Board. This court, in holding that the jurisdiction of the Adjustment Board under such circumstances, was exclusive, said:

> "Sustaining the state court's action would invite races of diligence whenever a carrier or union preferred one forum to another. And if a carrier or a union could choose a court instead of the Board, the other party would be deprived of the privilege conferred by [the Railway Labor Act] which provides that after negotiations have failed 'either party' may refer the dispute to the appropriate division of the Adjustment Board."

The history given in the many decisions of this court above cited show that from the time of the enactment of the Railway Labor Act of 1934, there should never have been any doubt but that the procedural provisions of Section 153, First (i), where invoked by either party were intended to be and are compulsory and mandatory with respect to any dispute growing out of the interpretation or application of a collective bargaining agreement. The legislative history cited and referred to by the court in *Chicago River* and in *Price* establishes that the representatives of railway

labor fought for the enactment of this bill and represented to Congress that under it "all of these minor disputes" would be finally decided by the Adjustment Board which involved the interpretation of a collective bargaining agreement as this case does.

It must be remembered that Cook's so-called grievance, if he has one, arises out of the collective bargaining agreement because at common law in the absence of a contract, the master could discharge his servant at will and such is also the law of Texas and under *T.W.A. v. Koppal*, 345 U.S. 653, it is the state law which controls. In *Advance Aluminum Castings Corp. v. Schulkins*, 267 S.W.2d 174, the Texas court said:

> "* * a contract for personal service which fixes no period during which it shall continue is at the will of the parties. See: East Line & R.R. Cy. Co. v. Scott, 72 Tex. 70, 10 S.W. 99; St. Louis, Southwestern Ry. Co. v. Griffin, 106 Tex. 477, 171 S.W. 703, L.R.A. 1917B, 1108; Dallas Hotel Co. v. McCue, Tex.Civ.App., 25 S.W. 2d 902, at page 905."

In 56 Corpus Juris Secundem 76, it is stated:

> "* * in the United States a general or indefinite hiring, or a hiring under a contract which does not specify a definite time or prescribe conditions which determine the duration of the relation, ordinarily is regarded as, or is presumed to be, a hiring at will."

Of course it is well established that the Railway Labor Act itself does not create any term of permanent employment. See *Beeler v. Chicago R.I. & P. Ry. Co.*, 169 F.2d 557, (CA-10, 1948); *T. & N.O. v. Railway Clerks*, 281 U.S. 648, 571 (1930); *Smithey v. St. Louis Southwestern Ry. Co.*, 237 F.2d 637 (CA-8, 1956).

Furthermore, as was found by the trial court in this case, the construction of the Railway Labor contracts, rules, customs and usages is involved in this suit (App. p. 28), and as was held by the Adjustment Board in this very case, "the record establishes that schedule agreement provisions and carrier's operating rules all of which are in conformity with customs and usages of the railroad industry relating to the whereabouts, accessibility, residence and authorized absence of rail carrier employees were not complied with." (App. p. 37)

In other words, involved in this suit, as was found by both the trial court and the Adjustment Board, is a construction of the union contracts, the operating rules of the carrier and the customs and usages of the railroad business.

As was stated in the Pitney case,

> "* * * we have seen that in order to reach a decision on that question the court first had to interpret the terms of ORC's collective bargaining agreements. The record shows, however, that interpretation of these contracts involves more than the mere construction of a 'document' in terms of ordinary meanings of words and their position * * * and since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood. The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue."

Here there was a timely submission to the Adjustment Board of this controversy by the carrier as it had a right to

do under the plain terms of the Railway Labor Act, but the Court of Appeals apparently in this case has judicially repealed that right granted by Congress to the carrier to submit this minor dispute to the Adjustment Board.

MOORE VS. ILLINOIS CENTRAL

The principal basis for the action of the Court of Appeals was this court's very early decision in *Moore vs. Illinois Central*, 312 U.S. 630, a case which arose out of the illegal discharge of Moore on February 15, 1933, before the effective date of the Railway Labor Act of 1934. In *Moore*, the Court of Appeals misinterpreted the doctrine of *Erie vs. Tompkins*, and refused to follow the Supreme Court of Mississippi on a question of limitation involved in that case. The writer has gone to the library of this court and reviewed the original record in *Moore* and this review disclosed the following:

The only ground for Moore's application for certiorari was that the Court of Appeals was in error in applying the Mississippi 3-year statute of limitations and the question of primary jurisdiction was not raised in the application for certiorari.

The brief of the Illinois-Central was only 23 pages long and the first 16 pages were devoted to the question of limitation. Less than 6 pages of the brief was devoted to the question of primary jurisdiction and on this question the railroad stood on the naked words of the statute and gave no legislative history. The next thing in the record is a brief prepared by the Solicitor General's office styled, "Memorandum for the United States as Amicus Curiae." Apparently the briefs of the parties were so inadequate on the question of primary jurisdiction that this court requested

the Solicitor General to brief this question. The following excerpts are taken from the Solicitor General's brief:

> "The opinion of the Supreme Court of Texas in *Mansell vs. T. & P.* 137 S.W.2d 997, contains a suggestion that the Board's jurisdiction may generally be exclusive *but not when the cause of action arose before the 1934 amendment to the Railway Labor Act.* The facts of both the Mansell case and the present case fall within the latter category.

As a matter of fact, the decision of the Supreme Court of Texas in the Mansell case, written by the present Chief Justice of the Supreme Court of Texas, does say:

> "No authority or principal of law with which we are familiar would support a holding that the [1934] amendment reached back and brought appellant's case within these terms."

The Solicitor General's brief goes on to say:

> "The Final Report of the Attorney General's Commission on Administrative Procedure declares that 'the courts have held that they (employees) may assert contract claims against carriers directly in court (p. 183)'."
>
> • • • •
>
> "(An) impressive case can be made for the proposition that the failure of Congress to declare that the Board was to have exclusive jurisdiction indicates that other remedies previously available were not to be destroyed.
>
> • • • •
>
> "It has also been held that parties who have lost before the Board may still sue on their original contract rights although this has not been conclusively determined. Stephenson vs. N. O. & N. E. P. Co., 177 So. 515, footnote 7, p. 11."

An examination of the *Stephenson* case will show that it arose under the 1926 Act and not the 1934 Act and actually the case does not hold what the Solicitor General says it did.

Quoting further from the Solicitor General's brief:

> "In view of the unconclusiveness of the act," etc. the Solicitor General suggested that one must turn to other sources such as "The historical background of the Adjustment Board and the relation between its predecessors and the courts * * *"

It can thus be seen that the Solicitor General said to this court that in order to get the meaning of the present Act one could look to the previous acts and the relationship between the Adjustment Board and the courts under the previous Act. This, of course, was refuted by the history of the Railway Labor Act given in the many decisions of this court beginning with the *Burley* case and extending down through the *Price* case.

On page 26 of the Solicitor General's brief it was suggested that:

> "It is possible to point to the substitution in 1934 of the less demanding 'may' for the mandatory 'shall' * * * as manifesting a deliberate effort by Congress not to give the present board exclusive jurisdiction."

It is submitted that this point likewise has been refuted by the subsequent cases above referred to, and from the standpoint of grammar, since Congress stated that "either party" may resort to the Adjustment Board, we can hardly see how Congress could have used any other word but "may" since it gave either party a right to do so, and Congress could not say that either party "shall", since it was optional with

the parties so to do and as was pointed out in the *Chicago River* case in footnote 22 by this court:

> "The Adjustment Board cannot entertain a case on its own motion. *Its processes must be invoked by one or both of the parties.*"

On page 28 of the Solicitor General's brief it is stated:

> "The practice of the courts in deciding cases under the prior statutes and agreements would thus be an indication as to whether the present act was designed to deprive the courts of jurisdiction."

We believe that the legislative history of the 1934 Act as above referred to refutes any such contention.

The Solicitor General then goes outside of the record and argues, on page 33:

> "At that time the Board had a general practice that 'no case asserted by an individual has ever been decided by the board'."

The Board had no hesitancy in deciding this *Cook* case. The Board had no hesitancy in deciding the *Price* case. The Board had no hesitancy in deciding the dispute involved in *Sjaastad vs. Great Northern*, 158 F.Supp. 760.

The brief further points out that Moore was not a member of the Union and the Union would not represent him which of course could not be the case now. *Steele vs. L. & N.R. Co.*, 323 U.S. 192, decided in 1944 nearly four years after *Moore*. It further called attention of the Board being three years behind in its docket and Moore's claim relative to seniority, although seven years old, had been lost by the Board. Contrasted with this statement we refer this court to the *Sjaastad* case where the submission of the minor dispute to the Adjustment Board took place on December 2, 1957, and thereafter the Board acted on this individual's

claim on January 31, 1958, or a period of less than two months.

In Moore's reply brief on certiorari it was stated:

> "The sole error urged in the petition for certiorari herein was the action of the Court of Appeals for the Fifth Circuit in holding that the three-year statute of limitations of the statutes of Mississippi is applicable to this cause."

Moore then urged, beginning on page 5 of his brief, the constitutional question raised because Moore's claim arose prior to the effective date of the 1934 Act, and although the Act purported to be retroactive, Moore argued that the retroactive feature was unconstitutional. The brief then went on to adopt the Solicitor General's brief as to the history and meaning of the Railway Labor Act.

It can therefore be seen that the opinion in Moore was based upon several false premises, urged upon the court by the Solicitor General on behalf of the United States as Amicus Curiae.

Professor Kenneth Culp Davis in his very recent and voluminous work on Administrative Law, 3 Administrative Law Treatise, Chap. 19, beginning on page 14, discusses the narrowing scope of the decision of this court in Moore, and says:

> "In Moore vs. Illinois Central, the Supreme Court * * * said without qualifications:
>
> "'But we find nothing in the [Railway Labor] Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court. But what the court could find in the Act in 1941 in the

> Moore case was somewhat different from what the court could find in the Act in 1946 in the Pitney case and in 1950 in the Slocum case.'
>
> "In Order of Railway Conductors vs. Pitney * * * the Supreme Court emphasizes that Congress had 'designated an agency peculiarly competent to handle the question here involved', and that the 'factual question is intricate and technical' and held that 'the court of equity should therefore in the exercise of its discretion stay its hand'."

In discussing the *Slocum* case, Professor Davis says:

> "The Slocum case thus left standing only a small portion of the Moore case * * *. The remnant of Moore which Slocum left standing was further whittled down in 1953 in Transcontinental & Western Air, Inc. v. Koppal."

Professor Davis then goes on further to state:

> "The remnant of the Moore case is getting smaller, but it has not yet altogether disappeared."

However, the Court of Appeals in this case has now taken the remnant of the Moore case and enlarged it far beyond its original scope. This court, in *Burley*, made the very pointed observation that *"The Moore case involved no question of the validity or the legal effectiveness of an award when rendered,"* whereas this is the very thing that the instant case does involve, so by this court's own words the Moore case is not controlling here.

In effect, what the Court of Appeals actually held was where the congressionally accorded right of a carrier to take a minor grievance to the Adjustment Board collides with what that court deemed to be a right accorded by this court in the Moore case of an employee to sue in court over a minor grievance, to wit, a claimed illegal discharge, the

congressionally accorded right must fall before the supposed judicially accorded right.

The Moore case was distinguished from the case at bar by the District Court wherein it was said:

> "The case principally relied upon is that of Moore v. Illinois Central R. Co., 312 U.S. 630, 61 S.Ct. 754, 85 L.Ed. 1089. The question that is before this court now, namely, as to whether or not under the Pitney case this court should exercise its equitable discretion to give the National Railroad Adjustment Board the first opportunity to pass upon the proper construction of the Railway Labor contracts, rules, customs and usages, was not involved in the Moore-Illinois Central case, and, as a matter of fact, the Moore case was decided long before the Pitney case was. Furthermore, apparently in the Moore-Illinois Central case, no question of construction of a Railway Labor contract, rules, customs or usages was involved, and neither of the parties had submitted such dispute to the Railroad Adjustment Board. In the Moore-Illinois Central case, the plaintiff had been wrongfully discharged by the railroad because he had brought a suit against it. If the question now before the court was as to whether or not Cook himself had to submit his claim to the Railroad Adjustment Board, the Moore case might be in point, but the question involved in this motion is not that, but is whether or not the Railway Labor Act means what it says when it says that 'either party' may submit the matter to the Railroad Adjustment Board."

In addition to the trial court's qualification of the Moore case, it should again be pointed out that the Moore case arose, not under the 1934 Act which for the first time provided for "compulsory arbitration," but under the 1926 Act which did not so provide.

The only difference between the case at bar and the *Price* case, both being cases of a claimed illegal discharge, is that in *Price* it was one of the "either" parties to the dispute, i.e. the employee who submitted such dispute to the Adjustment Board, whereas in the instant case it was the other of the "*either*" parties to the dispute i.e., the carrier who in due time invoked the jurisdiction of the Board, just as it was the carrier who in *Chicago River* submitted the minor disputes to the Adjustment Board, one of which minor disputes was a claimed illegal discharge.

A case quite similar to the one at bar is *Rose vs. Great Northern Railroad Co.*, a decision of the Court of Appeals for the eighth circuit, handed down on June 30, 1959, and not yet reported. In the *Rose* case, the plaintiff brought suit against the railroad and alleged "the plaintiff has been denied and refused his rights to employment and has been wrongfully discharged." There, as here, the railroad in due time submitted this minor grievance to the Adjustment Board and the Adjustment Board upheld the action of the railroad just as it did here. The Court of Appeals, relying on this court's decision in *Chicago River*, upheld the right of the railroad to submit such a dispute to the Adjustment Board and quoted from *Chicago River*, where this court said: "And either side may submit the dispute to the Board."

In disposing of the appellant's contention relative to the *Moore* case, the Court of Appeals for the eighth circuit said:

> "Appellant relies on the decision of the Supreme Court in *Moore v. Illinois Central R. Co.*, 312 U.S. 630. But in *Slocum v. Delaware L. & W.R. Co.* supra, the Supreme Court pointed out facts similar to those here presented which distinguished the *Moore* case. It said, 'Moore was discharged by the railroad.' " * * *

he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee * *.' His action for wrongful discharge did 'not involve questions of future relations between the railroad and its other employees' and as to a case like the present one, it said: 'If a court in handling such a case must consider some provision of a collective bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board.' *Whereas in this case compliance by the roadroad with plaintiff's demands might well be disastrous to labor relations with other employees and with the union behind them.* Moore's discharge was in February, 1933, before the effective date of the enactment of June 21, 1934. The Supreme Court also noted in *Elgin J. & E.R. Co. v. Burley*, 325 U.S. 711, l.c. 721, that 'The *Moore* case involved no question concerning the validity or the legal effectiveness of an award (of the Board) * * * Nor did it purport to determine that the Act creates no legal obligations through an award or otherwise.'

"We hold that the decision in the *Moore* case does not require reversal of the judgment here appealed from."

Of course this court cannot know at this stage what the effect of "compliance by the railroad with plaintiff's demands" might have been in this instance. However, as in the *Rose* case, had the railroad put Cook back to work after he left the property for some three months without a leave of absence, of course he would have deprived other members of his craft with less seniority of their right to work and this could have been disruptive of the relations between the railroad and the union. In other words, the carrier here, as in *Rose*, was on the horns of a dilemma.

Cook, as was found by the Railroad Adjustment Board (App. 37), in violation of the "collectively bargained

schedule agreement and the carrier's operating rules" deserted his post of duty for three months without a leave of absence, but more than two years later when he filed this suit in court he was still asking for reinstatement and time lost (App. 27). Had the carrier complied with Cook's demands, thereby supplanting employees in the same craft with lesser seniority than Cook, it could have been "disastrous to labor relations with other employees," but under the holding of the Court of Appeals herein, if the carrier complied with "the collectively bargained schedule agreement and the carrier's operating rules" and discharged Cook, the carrier could be subject to the hazards of a trial before a possibly sympathetic or prejudiced jury on the issue of an illegal discharge, with no right to present this minor dispute to the Adjustment Board.

As was stated by this court quite recently in passing upon a closely analagous labor situation in the case of *San Diego Building Trades Council vs. Garmon*, No. 66, decided April 20, 1959, and reported in 79 S.Ct. 773,

> *"The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.* Even the States' salutory effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme."

So here, should the railroad in this case be held for damages under state law for this claimed illegal discharge, when the federally constituted body peculiarly equipped to pass upon such questions has held that the discharge of Cook was not wrongful, will the railroad not have to think twice the next time before it protects men with lesser seniority against an employee who violates the "collectively bargained schedule agreement and the carrier's operating rules", as found by the Adjustment Board?

It is submitted that it was never the intention of Congress in enacting the 1934 Railway Labor Act that a carrier should be placed on the horns of any such dilemma without the right to resort to the Adjustment Board for its protection.

Much confusion exists in the lower courts over the language used in the Moore case which conflicts with the language of this court in the many later cases above discussed. This confusion is illustrated by a decision of the Court of Appeals of the Seventh Circuit, in *Starke vs. N.Y.C. & St. L.R. Co.*, 180 F.2d 596 at 572, wherein that court said:

> "But if this be not a valid distinction it appears certain that Moore has been overruled by subsequent decisions of the Supreme Court. See particularly Elgin, Joliet & Eastern Ry. Co. v. Burley et al., 325 U.S. 711,725 65 S.Ct. 1282, 89 L.Ed. 1886."

Judge Igoe stated in *Rossa v. Flying Tiger Line, Inc.* 35 Labor Cases 521-123 (N.D. Ill. June 26, 1958):

> "Furthermore there is some doubt whether the Supreme Court would now adhere to its decision in Moore in view of its more recent opinion in Brotherhood of R. T. vs. Chicago R. & I. R.R. Co., 353 U.S. 30, rehearing denied 353 U.S. 948, in which the court read the Adjustment Board provisions of the Railway Labor Act as constituting compulsory arbitration."

The author of the Court of Appeals opinion in the instant case speaks of this confusion as the "agonizing, tactical-strategic problems facing diligent counsel as they attempt to chart the course for passage between Moore-Koppal versus Slocum, State versus Federal, Voluntary versus Involuntary administrative remedy—a task which, in contrast, makes the classic figure of Odysseus between Scylla and Charybdis quite unforeboding." See *Sigfred v.*

Pan American World Airways, 230 F.2d 13 at 19. In this very case a competent and conscientious trial court, following the language of this court in *Burley*, *Pitney* and *Chicago River*, decides this case one way, whereas a competent and conscientious appeals court, following the language of *Moore*, decides this case the opposite way and both courts are following the language used by this court in reaching diametrically opposite results.

Litigants, lawyers and lower courts should not be forced to try to chart a course between the Scylla of *Moore* and the Charybdis of *Chicago River*, *Day* and *Price*. This court should, without hesitation, take jurisdiction of this case, clear up this confusion, and once and for all chart for the guidance of all the true course to be followed.

CONCLUSION

It is respectfully submitted that it is of great importance that writ of certiorari in this case be granted and that an authoritative pronouncement of this court be made as to its construction of the Railway Labor Act where the jurisdiction of the Adjustment Board is timely invoked by one of the parties to a minor dispute, whereas the other party invokes the jurisdiction of a court and where the minor dispute is a claimed, illegal discharge. This is a question of grave moment in the railroad world and one which has not heretofore been decided by this court.

Respectfully submitted

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APPENDIX

J. W. COOK

v.

Guy A. THOMPSON, Trustee, San Antonio, Uvalde & Gulf Railroad Company.

Civ. A. No. 2076.

United States District Court
W. D. Texas, San Antonio Division.

April 12, 1957

RICE, Chief Judge.

This is a Railway Labor dispute in which a construction of Section 153, First (i) of the Railway Labor Act, Title 45 U.S.C.A. is involved.

[1, 2] In January of 1953, the plaintiff Cook was discharged by the defendant carrier for having failed to protect his assignment for three months without a leave of absence. No action was taken by Cook until December of 1954, at which time Cook filed this suit in the state court and in due time it was removed to this court. Originally Cook prayed for reinstatement and payment for time lost, but the carrier promptly filed its plea to the primary jurisdiction of the court citing in its plea the case of Slocum v. Delaware L. & W. R. Co., 339 U.S. 239, 70 S.Ct. 577, 94 L.Ed. 795. Thereafter, in May of 1955, at the first hearing in this case, the court indicated that it was felt that under the Slocum case the court had no jurisdiction to order reinstatement and payment for time lost, and the plaintiff thereupon asked, and was granted, leave to amend to eliminate from his pleadings the matter of the reinstatement and payment for time lost, which he did.

The carrier likewise filed a plea based upon the plaintiff's failure to exhaust administrative remedies, and, at the time the case was next called in October of 1955, it was brought to the attention of the court that the case of Thompson v. Moore, 5 Cir., 223 F.2d 91, was pending on application for writ of certiorari to the Supreme Court, and that this case would have a bearing upon the defendant's plea of failure of the plaintiff to exhaust administrative remedies. The case was passed at the time to await the outcome of the Thompson-Moore case. On October 24, 1955, the Supreme Court denied certiorari in the Thompson-Moore case, and thereafter in December of 1955 the carrier filed its submission of this controversy with the proper division of the National Railroad Adjustment Board.

Thereafter, plaintiff filed its submission with the Adjustment Board, in which it urged laches on the part of the carrier and want of jurisdiction on the part of the Adjustment Board, claiming that exclusive jurisdiction of this controversy was vested in this court.

Thereupon, the defendant carrier filed in this court its motion for this court to exercise "equitable discretion to give (the National Railroad Adjustment Board) the first opportunity to pass on the issue", namely, the construction of the Railway Labor contracts, rules, customs and usages involved in this suit. Both parties submitted briefs to this court on the question.

It is obvious from the plaintiff's complaint that there is involved in this suit a construction of the collective bargaining agreement between the railroad and the Union, as well as the construction of the operating rules of the Company and the customs and usages of the Railroad, all of which will have to be construed before a decision in this case can be made.

Under the facts above related, the court is of the opinion that the carrier has acted with comparative diligence in this matter and feels that Cook's plea of laches should therefore be overruled, so that the only question remaining is whether or not this court has compulsory and exclusive jurisdiction of this controversy.

In the case of Order of Railroad Conductors v. Pitney, 326 U.S. 561, 66 S.Ct. 322, 324, 90 L.Ed. 318, the Supreme Court of the United States, in discussing the history of the Railway Labor Act said:

> "Congress has specifically provided for a tribunal to interpret contracts such as these in order finally to settle a labor dispute. Section 3 First (i) of the Railway Labor Act provides that disputes between a carrier and its employees 'growing out of • • • the interpretation or application of agreements concerning rates of pay, rules or working conditions • • • may be referred by either party to • • • the Adjustment Board.' The Board can not only order reinstatement of the employees, should they actually be discharged, but it can also under § 3, First (o) and (p) grant a money award subject to judicial review with an allowance for attorney's fees should the award be sustained. Not only has Congress thus designated an agency peculiarly competent to handle the basic question here involved, but as we have indicated in several recent cases in which we had occasion to discuss the history and purpose of the Railway Labor Act, it also intended to leave a minimum responsibility to the courts.
>
> "• • • We have seen that in order to reach a decision on that question the court first had to interpret the terms of O.R.C.'s collective bargaining agreements. The record shows, however, that interpretation of these contracts involves more than the mere construction of a 'document' in terms of the

> ordinary meaning of the words and their position. See [W. P.] Brown [& Sons] Lumber Co. v. Louisville & N. R. Co., 229 U.S. 393, 396, 57 S.Ct. 265, 266, 81 L.Ed. 301; Great Northern Ry. Co. v. Merchants Elevator Co., 259 U.S. 285, 291, 42 S.Ct. 477, 479, 66 L.Ed. 943. For O.R.C.'s agreements with the railroad must be read in the light of others between the railroad and B.R.T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom that too must be taken into account and properly understood. The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue."

Obviously the language of defendant's motion to stay in this case was copied from the opinion of the Supreme Court in the Pitney case. The defendant's motion asked for this court to "exercise equitable discretion to give that agency (the National Railroad Adjustment Board) the first opportunity to pass on" the proper construction of the Railway Labor contracts, rules, customs, and usages that are involved in this suit.

It is provided in the Railway Labor Act, Title 45 U.S. C.A. § 153 first (i) that after the parties have failed to reach an agreement between themselves, "the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board." Certainly the carrier was a party which failed to reach an agreement with the plaintiff, and as such the carrier has exercised its right to refer this matter to the appropriate division of the Adjustment Board.

In the case of Order of Railway Conductors of America v. Southern Railroad Co., 339 U.S. 255, 70 S.Ct. 585, 586, 94 L.Ed. 811, which was decided on the same day as the Slocum case, the Supreme Court, after referring to its decision in the Slocum case, said:

> "We discuss this case separately because it sharply points up the conflicts that could arise from state court intervention in railroad-union disputes. After the railroad had sued in the state court, the union filed a petition for hearing and award before the Adjustment Board. The state court nevertheless proceeded to adjudicate the dispute. Sustaining the state court's action would invite races of diligence whenever a carrier or union preferred one forum to the other. And if a carrier or a union could choose a court instead of the Board, the other party would be deprived of the privilege conferred by § 3, First (i) of the Railway Labor Act, 48 Stat. 1191, 45 U.S.C. § 153, First (i) 45 U.S.C.A. § 153, First (i), which provides that after negotiations have failed 'either party' may refer the dispute to the appropriate division of the Adjustment Board."

In the case at bar, it was the employee who brought suit first in the state court and this case was removed to the federal court and thereafter it was railroad who submitted the controversy to the Adjustment Board, whereas, in the Order of Railway Conductors of America case it was the Union, as representing the employees, who submitted the matter to the Adjustment Board after the Railroad had put the matter in court, so that it is apparent that the Order of Railway Conductors of America case is directly in point.

If the employee in this case could choose a court instead of the Board to pass upon its dispute, the carrier would be

deprived of the privilege conferred by the Railway Labor Act, which provides that after negotiations have failed "either party" may refer the dispute to the appropriate division of the Adjustment Board. Obviously, the statute means just what it says and has been so interpreted in unequivocal language by the Supreme Court of the United States. In the language of the Pitney case, the Railroad having exercised its statutory right of submitting its controversy to the Adjustment Board, this court should exercise its equitable discretion to give the Board the first opportunity to pass upon the proper construction of the Railway Labor contracts, rules, customs and usages that are involved in this suit.

A brief discussion of the authorities cited by the plaintiff employee would seem to be in order.

The case principally relied on is that of Moore v. Illinois Central R. Co., 312 U.S. 630, 61 S.Ct. 754, 85 L.Ed. 1089. The question that is before this court now, namely, as to whether or not under the Pitney case this court should exercise its equitable discretion to give the National Railroad Adjustment Board the first opportunity to pass upon the proper construction of the Railway Labor contracts, rules, customs and usages, was not involved in the Moore-Illinois Central case, and as a matter of fact, the Moore case was decided long before the Pitney case was. Furthermore, apparently in the Moore-Illinois Central case, no question of construction of a Railway Labor contract, rules, customs or usages was involved, and neither of the parties had submitted such dispute to the Railroad Adjustment Board. In the Moore-Illinois Central case, the plaintiff had been wrongfully discharged by the railroad because he had brought a suit against it. If the question now before the court was to whether or not Cook

had to submit his claim to the Railroad Adjustment Board, the Moore case might be in point, but the question involved in this motion is not that, but whether or not the Railway Labor Act means what it says that "either party" may submit the matter to the Railroad Adjustment Board.

Plaintiff likewise relies upon the case of Adams v. New York, C. & St. L. R. Co., 7 Cir., 121 F.2d 808, 809. The Adams case involved a "complaint seeking a declaratory judgment defining their seniority rights as railroad employees". The trial court, prior to the decision in the Moore case, sustained the carrier's motion to dismiss on the grounds that exclusive jurisdiction of such controversy vested in the Adjustment Board. The case came on in the Court of Appeals after the decision in the Moore case, and the Court of Appeals apparently misconstrued the Moore case and held that under the Moore case the courts had jurisdiction to determine such a controversy. Subsequently, the Supreme Court held, in the case of the Order of Railway Conductors of America v. Southern Railroad Co., supra, directly to the contrary of what the Adams case held.

The case of Newman v. Baltimore & O. R. Co., 3 Cir., 191 F.2d 560, relied upon by the plaintiff, is likewise not in point. There, neither party had undertaken to submit the controversy to the Adjustment Board, and the question before the court was not as to whether or not the court should exercise its equitable discretion, but was whether or not the plaintiff had to submit the controversy to the Adjustment Board.

Plaintiff likewise relies upon Oswald v. Chicago B. & Q. R. Co., 8 Cir., 200 F.2d 549. That case did not involve any question of the court's exercising its equitable discretion to stay. The only question before the court was whether or not plaintiff should be permitted to amend his pleadings

to try to bring himself within the decision of the Supreme Court in the Moore-Illinois Central case.

The case of the Transcontinental & Western Air v. Koppal, 345 U.S. 653, 73 S.Ct. 906, 907, 97 L.Ed. 1325, likewise did not involve the question of whether or not the court should exercise its equitable discretion so that the carrier could avail itself of the right given to it under the Railway Labor Act to have the Railroad Adjustment Board first pass upon the construction of the Railroad Labor contract, rules, customs and usages. The only question before the court in the Koppal case was as to whether or not an employee must exhaust his administrative remedies before suing in court.

The Slocum case likewise did not involve any question of the court's exercising its equitable discretion, nor did the case of Texas & N. O. R. Co. v. McCombs, 143 Tex. 257, 183 S.W.2d 716, involve any such question.

If this was a hearing on the defendant's plea of failure to exhaust administrative remedies, both the Slocum and the McCombs cases might be in point, but that is not the motion that is now before the court, which is only that this court should exercise its equitable discretion to stay in this case.

Such is likewise the situation in the case of Thompson v. Moore, 5 Cir., 223 F.2d 91.

The case of Kelly v. Nashville C. & St. L. Ry. Co., D.C., 75 F.Supp. 737, and Award No. 11908, First Division of the Railroad Adjustment Board (Referee Leverette Edwards), involving Engineer (Kelly) both were decided upon the same state of facts, and the court there merely held the plaintiff employee could not file his claim both with the Adjustment Board and at the same time prosecute the same claim in

court. No question of equitable discretion to stay was involved therein.

The motion now under consideration being strictly a motion asking this court to "exercise its equitable discretion to give (the National Railroad Adjustment Board) the first opportunity to pass on" the proper construction of the Railway Labor contracts railroad rules, and customs and practices, this is not a hearing on the plea of primary jurisdiction nor a hearing on the defendant's plea of the failure of the plaintiff to exhaust his administrative remedies. The Railway Labor Act, Title 45 U.S.C.A. § 153 First (i) seems clear and since the parties hereto failed to reach an agreement between themselves, "the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board." The Railroad has exercised its statutory right to submit this controversy to the Adjustment Board and in the language of the Pitney case [326 U.S. 561; 66 S.Ct. 325], "under the circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue." This is the order of this court and the motion to stay is granted.

J. W. COOK
VS.
MISSOURI PACIFIC RAILROAD COMPANY } CIVIL ACTION NO. 2076

This court having heretofore entered its order staying the above case in order to give the National Railroad Adjustment Board the first opportunity to pass upon the construction of the Railway Labor contracts and the Railway rules, customs and usages involved in this suit; and the Defendant now having made known to the court that said Adjustment Board has made and entered its final award in the following terms:

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

AWARD 17970

DOCKET 33774

PARTIES TO DISPUTE } San Antonio, Uvalde and Gulf Railroad Co.
J. W. Cook

STATEMENT OF CLAIM: "Request that the First Division, National Railroad Adjustment Board sustain action of the Carrier in dismissing J. W. Cook from Carrier's service January 26, 1953 for failure to protect his assignment as engineer-fireman on the San Antonio, Uvalde & Gulf Railroad since August 15, 1952.

FINDINGS: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, findings that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction. Hearing was held.

The dispute comes to this Division by petition of the carrier and involved the question of its action in dis-

charging an employee in engine service for his failure to comply with rules of the collectively bargained schedule agreement and the carrier's operating rules.

The employee's last service was performed at Corpus Christi, Texas, on August 15, 1952, as locomotive engineer, from which time he was voluntarily absent and inaccessible without leave. The record discloses that nothing was heard from him for approximately three months when a letter dated November 12, 1952, was received by the carrier's Superintendent containing a request for a leave of absence both retrospectively to the date of his having left his job and continuing until January 1, 1953. The letter stated he had removed his wife to another climatic region of Texas for reasons of her health. The request for leave to be absent, made at a time when his period of absence was already of some three month's duration, was not granted.

There is no evidentiary showing in this record of sickness either of the employee or of his wife, nor is there any suggestion of suddenness in the health condition that is mentioned.

The carrier refers to Article 29 governing the subject of leaves of absence, and to its Operating Rule No. 504 requiring employees to register address changes and give notice of where they can be found. The record establishes that schedule agreement provisions, and carrier's operating rules, all of which are in conformity with customs and usages in the railroad industry relating to the whereabouts, accessibility, residence, and authorized absence of rail carrier employees, were not complied with.

The position of the carrier and its action taken in these circumstances will, therefore, be sustained.

AWARD: Carrier's action in dismissing J. W. Cook is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD

By Order of First Division

Attest: s/J. M. Macleod
Executive Secretary

Dated at Chicago, Illinois

This 17th day of January, 1957.

And it appearing to the court that under Title 45, Section 153, first (m), it is provided that 'the award shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award,' the court is of the opinion that this cause should be dismissed, since the award of the Adjustment Board is final, there having been no money award.

It is therefore, ORDERED, ADJUDGED and DECREED that this cause be, and the same hereby is, in all things DISMISSED with prejudice.

DONE and ordered entered this 2nd day of January, 1958.

S/Ben H. Rice, Jr.

Judge of the U.S. District Court for the Western District of Texas

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17216

J. W. COOK

Appellant,

versus

MISSOURI PACIFIC RAILROAD COMPANY,

Appellee.

Appeal from the United States District Court for the Western District of Texas.

(February 27, 1959.)

Before TUTTLE, JONES and BROWN, Circuit Judges.

BROWN, Circuit Judge: Two things distinguish this case from the run-of-the-mill suit for damages for wrongful discharge of an employee by a railroad both of whom are subject to the Railway Labor Act, 45 USCA §§151-164 (1926), as amended. First, while the Employee's case was pending in Court, not yet tried or determined, the Railway Adjustment Board entered an Award holding the discharge of Cook rightful. Second, at about the same time as the District Court granted a stay (150 F.Supp. 650, April 12, 1957), but prior to the dismissal of the case by the District Court (161 F.Supp. 538, January 2, 1958) on the ground that the intervening Award of the Adjustment Board was final and binding, the Supreme Court in Brother-

hood of Railroad Trainmen v. Chicago R. & I.R.R., March 25, 1957, 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622, described the Railway Labor Act in terms of compulsory arbitration. This contrasted sharply with its earlier language in *Moore v. Illinois Central R.R.*, 1941, 312 U.S. 630, ...S.Ct...., 85 L.Ed. 1089, in which this Act was characterized as one for voluntary conciliation.

The combination of the two is enough for the Railroad's advocate to contend with vigor and optimism that what *Moore* accords—a *right* to treat the discharge as final and sue in a Court for breach of contract—now collides with the *right* of the Railroad to take the dispute to the Adjustment Board whose decision is final and binding. Without attempting to formulate a rule of choice in this impossible impasse, the Railroad is content to accept the position that the outcome depends, or may, on which agency—Court or Board—first decides the case.

The unsatisfactory nature of any such rule is perfectly evident. What are "rights" or thought to be "rights" turn

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We have often and recently spoken of it in terms of a *right*. Majors v. Thompson, 5 Cir., 1956, 235 F.2d 449, 451-52:

> • • • Where the employe has voluntarily applied to the Board for reinstatement, an election of remedies has been made which bars the *right* to litigate before the courts a claim for damages for wrongful discharge. • • •. This case is one where the plaintiffs had the *right* to elect an administrative remedy for reinstatement or judicial remedy for damages, but without any *right* to seek both remedies. • • •"

In Thompson v. Moore, 5 Cir., 1955, 223 F.2d 91, 93, we described it as the employees' "option to pursue his judicial remedy without first exhausting his administrative remedy. • • •"

In Woolley v. Eastern Air Lines, 1957, 5 Cir., 250 F.2d 86, 90, we called it the employee's election. "The two Supreme Court decisions [*Slocum* and *Moore*] • • • make clear the election that is available to the employee. If he determines that he will treat his grievance as involving a determination of rights as an employee under the bargaining agreement and asserts his rights to be retained as an employee he must go to the Board for redress. If he accepts the action of the carrier as a final discharge, he may sue in court for a breach of the contract of employment. He may not do both."

out to be something less, and all depending primarily on chance, not reason. It is chance that the state of the docket in a particular court is such that the Adjustment Board's Award comes down before the court case is tried, even though the Judge has previously denied the railroad's formal motion to stay pending the administrative decision.[2] It is chance that the particular Judge grants a stay, where others might not, on the sole ground that the Board should first have the opportunity to determine the issue. This is more than a stay. It is virtually abdication for when done it assures that there will never be anything to try since the Award, for or against Railroad or employee, will be binding.[3] And to chance as a poor determinant must be added the even more unsatisfactory prospect—that of a conscious race against time for the first decision. That opens up any adjudicatory system—whether Court or administrative—to urgent and persistent importunities on the one hand, resistance and opposition on the other, together with the likelihood of abuses which such pressures invite or generate, wholly without regard to the obvious inability of either to know or predict the outcome and with each having hope only that the probability of success is greater in the one forum rather than the other.

[2] That is what took place in Spastad v. Great Northern Ry. D.C.N.D., 155 F.Supp. 307 (1957), 158 F.Supp. 760 (1958).

[3] That is what happened in this case. Suit was filed December 1954. By amendment the plea for reinstatement was eliminated leaving only the suit for damages for breach of contract for wrongful discharge. In October 1955 the Court passed the case pending action by the Supreme Court on application for certiorari in Thompson v. Moore, 5 Cir., 1955, 223 F.2d 91. Certiorari was denied October 24, 1955. Subsequently, in December 1955 the Railroad filed its initial submission of this controversy with the National Railroad Adjustment Board. Thereafter the Railroad filed its motion for a stay. This was granted for the reasons pointed out in the Court's main opinion, Cook v. Thompson Trustee, D.C.W.D. Tex., 1957, 150 F.Supp. 650. Subsequently, January 17, 1957, the Adjustment Board rendered an Award holding the discharge proper. Thereafter the District Court, solely on the basis of the Award, dismissed the case with prejudice.

We do not believe that Congress meant to prescribe any such unpredictable procedure or that the Supreme Court has intended that its interpretations should bring it about.

That we are faced with this in this case springs, we think, from a basic misconception by the District Court. Its opinion, 150 F.Supp. 650, incorporated as a part of the agreed statement of the case for appeal, FRCP 76, shows that the stay was based on *Order of Railway Conductors v. Pitney*, 1946, 326 U.S. 561, ...S.Ct...., 90 L.Ed. 318. So much so was it that the Court remarked "Obviously the language of defendant's [Railroad's] motion to stay in this case was copied from the opinion of the Supreme Court in the Pitney case." 150 F.Supp. 650 at 652.

The District Court apparently thought that the Supreme Court's reference to the exercise of equitable discretion would apply to a suit for damages for wrongful discharge. Of course, *Pitney* did not involve any such claim. That was the case of a Federal Bankruptcy Court having supervision over the estate of a bankrupt. A dispute arose between the management of the Railroad (that is the receiver, trustee or debtor in possession) and the Brotherhood as to allocation of certain work under the collective bargaining contract. But this had to do with the continuing relations between the Railroad and its current employees.

That *Pitney* was not intended in any way to restrict or limit or modify *Moore* is shown by *Slocum v. Delaware L. & W. R.R.*, 1950, 339 U.S. 239, ...S.Ct. ....94 L.Ed. 795. That opinion took cognizance of both *Pitney* and *Moore*. As to *Pitney* it expanded what the Court had described as equitable *discretion* to defer action pending administrative determination into one of *power*, i.e., jurisdiction. Its precise hold-

ing was that a dispute between two rival brotherhoods concerning existing employees was for the exclusive determination of the Adjustment Board, and beyond the capacity of State Courts to interfere. Concerning *Pitney* it said, "This reasoning equally supports a denial of power in any court—state as well as federal—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act." 339 U.S. at 244. . . . S.Ct. at . . . , 94 L.Ed. at 800. As to *Moore* it was even more pointed.

> "Our holding here is not inconsistent with our holding in Moore v. Illinois Cent. R. Co., 312 U.S. 630, 85 L ed 1089, 61 S Ct 754. Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provision of a collective-bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board.
>
> "We hold that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive. The holding of the Moore Case does not conflict with this decision, and no contrary inference should be drawn from any language in the Moore opinion. * * *." 339 U.S. at 244-45. . . . S.Ct. at . . . , 94 L.Ed. at 800.

The result was that the Supreme Court intended that *Moore* and *Slocum* should coexist. *Moore* itself rejects the subsidiary argument here advanced by the Railroad that, dealing with a 1926 Act case, the 1934 amendments applicable here compel another result. Any doubt on that score was, of course, obliterated by the implicit approval of *Moore* twelve years later in *Transcontinental and Western Air, Inc. v. Koppal*, 1953, 345 U.S. 653, . . . S.Ct. . . , L. Ed 1325.

If *Moore* has lost this vitality, or if its strength has been sapped, it is from occurrences subsequent to *Koppal*, and for us, since the last of our many decisions on this subject, see note 1, *supra*. The event here deemed decisive by the Railroad was the decision in *Brotherhood of Railroad Trainmen v. Chicago R. & I. R.R.*, 1957, 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622.

Without a doubt this opinion speaks in unmistakable terms and its action is far-reaching in compelling *both* parties upon the application of *one of them*, to proceed to a determination of the "minor" disputes before the Board. *Louisville & N. R.R. v. Brown*, 5 Cir., 1958, 252 F.2d 149. The "* * * provisions [of the Act.] dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field. Our reading of the Act is therefore confirmed, not rebutted, by the legislative history," *Railroad Trainmen v. Chicago R. & I. R.R.*, *supra*, 353 U.S. at 39, 77 S.Ct. at 640, 1 L.Ed.2d 628. "The National Board was given jurisdiction over 'minor disputes,' meaning those involving the interpretation of collective bargaining agreements in a particular set of facts. Either party to such a dispute could bring the other before the Board in what was, in fact, compulsory arbitration. * * *." *State of California v. Taylor*, 1957, 353 U.S. 553, 558-59, 77 S.Ct. 1037, . . . 1 L.Ed.2d 1034, 1038.

To be sure this stands now in sharp contrast to what was said in *Moore*. "For neither the original 1926 Act nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation, voluntary in its nature." 312 U.S. at 633-36, . . . S.Ct. at . . . , 85 L.Ed. at 1093.

But in its recent characterizations of the Act as one of compulsory arbitration requiring that it "* * * be literally applied in the absence of a clear showing of a contrary or qualified intention of Congress," 353 U.S. 30 at . . . , 1 L. Ed. 2d . . . at . . . , we do not think that the Court meant to clear the tracks of *Moore* and the great body of law it set in train.

This decision, portentous as it is, still respects the line which *Moore* and *Slocum* drew: has the employee accepted as final the termination of the relationship of employer-employee? Or is the employee seeking to continue his status as an employee? If it is the former, the remedy of damages in a court of law is the right of the employee. Industrial peace[4] and the uninterrupted operation of the railroad system will not be imperiled by the determination of that isolated dispute in a court proceeding. The "right" of the railway to compel resort to the Adjustment Board concerns only a dispute between it and one then having or claiming to have the status, or right to the status, of an employee.

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[4] Of course the claim by the Brotherhood that a previous discharge of an employee was wrongful may itself be a *Slocum* dispute for the exclusive determination of the Adjustment Board insofar as it affects the continuing relationship between the railroad and its current employees. This was one of the twenty-one grievances involved in Brotherhood of Railroad Trainmen v. Chicago R. & I. R. Co., 353 U.S. 31, 1 L.ed.2d 622.

Where that status has been finally terminated and no effort is being made to revive or reinstate it, the employee has the absolute right, subject only to State procedural requirements, *Transcontinental & Western Air, Inc. v. Koppal, supra*, to treat the relationship wholly at an end and sue as for any other breach of contract.

He may, of course, waive that right by proceeding voluntarily on the administrative route. That election binds him. *Majors v. Thompson, supra.* But the employee, and the employee alone, can make that election. Once the employee has properly set the judicial claim in motion, nothing which the railroad thereafter does, nor action which the Adjustment Board takes, can detract from the employee's right to pursue to the end a judicial determination of his breach of contract suit.

The Court has the constitutional duty to hear and determine this cause. The Award of the Adjustment Board was not binding or final on Cook. The Court could dismiss the cause only after a determination. To secure this determination a judicial trial must be had.

REVERSED AND REMANDED

A true copy

Test: s/Edward W. Wadsworth
Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana, April 17, 1959.